IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 267 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 Yes
3 to 5 No

FAKIR MOHMED HAJI HASAN
Versus
COMMISSIONER OF INCOME TAX

Appearance:
MR SN SOPARKAR for Petitioner
MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE A.R.DAVE

Date of decision: 10/08/2000

ORAL JUDGEMENT

(per R.K. Abichandani, J.)

The Income Tax Appellate Tribunal, Ahmedabad Bench 'C', has referred the following questions under sec. 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') for the opinion of this Court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee had been found in possession of gold valued at Rs. 48.72 lacs and as such he was owner of said gold and value of said gold was liable to be included in the income of the assessee because of the fact that no explanation regarding source from which investment in said gold had been made, had been given by the assessee?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that no deduction in respect of value of gold which had been confiscated was allowable from the income of the assessee?"

2. The relevant Assessment Year is 1984-85. The assessee derived income from the firm of M/s. Fakir Mohmed Haji Hassan & Co., Jam-Khambhalia, of which the assessee was a partner. His minor son's share in the said firm was liable to be included in his income. The assessee filed return for the Assessment Year 1984-85 on 12th February 1985 declaring an income of Rs. 48,520/-. The ITO issued notice under sec. 143(2) of the Act seeking certain information. In response thereto, the assessee's Accountant had attended the office of the ITO and explained the return. The ITO called upon the assessee to give information about the incident of seizure of gold worth Rs. 48,72,000/- on 19th April 1983. The assessee disclosed to the ITO that the Customs Department had confiscated the gold in question and the proceedings under the Customs Act were pending against the assessee. The Collector of Customs, in adjudication proceedings, had imposed penalty of Rs. 25 lacs on the assessee by his order dated 30th November 1983 passed under sec. 112 of the Customs Act,1962 in connection with the smuggling of 2320 tolas of gold of foreign original valued at Rs. 48,72,000/-. The ITO recorded a finding that the value of the said gold was liable to be

added in the income of the assessee under sec. 69A of the Act and made the addition accordingly. During the search by the Customs authorities, an amount of Rs. 46,000/- was also recovered, which was not explained by the assessee and that amount was also consequently added in the income of the assessee by the ITO. In appeal, the CIT (Appeals) confirmed the additions and in further appeal, the Tribunal upheld those decisions.

3. The Tribunal found that the facts as disclosed in the Customs proceedings, which were relied on in the Income-tax proceedings, were that specific information was received by the Customs Department, Ahmedabad indicating that the assessee would bring imported gold on 19th April 1983 in his car and would make delivery thereof at a place near Quality Restaurant, Kankaria, Ahmedabad. On the basis of such information, a watch was kept and at about 4.30 p.m. when the Customs Officers spotted the persons who were concerned and accosted them and after a scuffle apprehended three persons, one of whom was the assessee. The car was seized in presence of the panch witnesses and at that time during search 232 gold bars of foreign markings valued at Rs. 48,72,000/were recovered. These were concealed in five cotton strips kept in dashboard behind the air-conditioner of the car. A bag containing currency notes of Rs. 46,000/- was also recovered. All these articles were seized. The statements which were recorded under sec. 108 of the Customs Act were considered in the adjudication proceedings and the gold was confiscated absolutely to the Government by an order made by the Customs authorities. The assessee was given an option to redeem the car on payment of fine of Rs. 28,000/-.

4. The ITO found that all the surrounding circumstances indicated that it was the assessee who was the owner of the gold, which was found concealed in the car and the value of the gold was, therefore, added in his income, which finding was confirmed by the first Appellate Authority. The Tribunal, on appreciating the evidence, also held that the only inference that could be drawn from the facts of the case was that it was the assessee who had kept the gold in question in the car, and that he had come to Ahmedabad to dispose it of and, since he was the owner of the gold, the value thereof was liable to be added as income of the assessee under sec. 69A of the Act. The Tribunal also found that it was not the assessee's case that he had derived any income from any business of smuggling and therefore it could not be said that confiscation of gold represented a trading loss in the hands of the assessee. No deduction could

therefore be allowed as claimed by the assessee.

5. In our opinion, the Tribunal has come to these findings on the basis of material on record, reaching a fair decision in the process. The Tribunal rightly held that the ratio of the decisions in CIT v. S.C. Kothari, 82 ITR 795(SC), CIT v. Piara Sing, 124 ITR 40(SC) and CIT v. Shri Ram Chander reported in 159 ITR 689 (P&H) did not apply to the facts of the present case because, what was included in the assessee's income was not the profits of an illegal business, but an unexplained investment in gold, which was found in possession of the assessee.

6. Under sec. 4 of the Income-tax Act, income tax is to be charged in accordance with the provisions of the Act in respect of the total income of the previous year of every person. As provided by sec. 5, total income of any previous year of a person would, inter alia, include all income from whatever source derived which is received or is deemed to be received by such person, subject to the provisions of the Act. It will be seen from sec. 69A of the Act that where the bullion, jewellery or other valuable article is not recorded in the books of accounts and there is no explanation about the nature and source of its acquisition, or the explanation is not satisfactory, the value thereof may be deemed to be the income of the assessee of the financial year immediately preceding the assessment year in which the assessee is found to be the owner of such bullion, etc.

6.1 The scheme of sections 69, 69A, 69B and 69C would show that in cases where the nature and source of investments made by the assessee or the nature and source of acquisition of money, bullion etc. owned by the assessee or the source of expenditure incurred by the assessee are not explained at all, or not satisfactorily explained, then, the value of such investments and money or value of articles not recorded in the books of accounts or the unexplained expenditure may be deemed to be the income of such assessee. It follows that the moment a satisfactory explanation is given about such nature and source by the assessee, then the source would stand disclosed and will therefore be known and the income would be treated under the appropriate head of income for assessment as per the provisions of the Act. However, when these provisions apply because no source is disclosed at all on the basis of which the income can be classified under one of the heads of income under sec. 14 of the Act, it would not be possible to classify such deemed income under any of these heads including income

from "other sources" which have to be sources known or explained. When the income cannot be so classified under any one of the heads of income under sec. 14, it follows that the question of giving any deductions under the provisions which correspond to such heads of income will not arise. If it is possible to peg the income under any one of those heads by virtue of a satisfactory explanation being given, then these provisions of sec. 69, 69A, 69B and 69C will not apply, in which event, the provisions regarding deductions etc. applicable to the relevant head of income under which such income falls will automatically be attracted.

6.2 The opening words of sec. 14 "Save as otherwise provided by this Act" clearly leave scope for "deemed income" of the nature covered under the scheme of sections 69, 69A, 69B and 69C being treated separately, because such deemed income is not income from salary, house property, profits and gains of business or profession, or capital gains, nor is it income from "other sources" because the provisions of sections 69, 69A, 69B and 69C treat unexplained investments, unexplained money, bullion etc. and unexplained expenditure as deemed income where the nature and source of investment, acquisition or expenditure, as the case may be, have not been explained or satisfactorily explained. Therefore, in these cases, the source not being known, such deemed income will not fall even under the head "income from other sources". Therefore, the corresponding deductions, which are applicable to the incomes under any of these various heads, will not be attracted in case of deemed incomes which are covered under the provisions of sections 69, 69A, 69B and 69C of the Act in view of the scheme of those provisions.

7. It is, therefore, clear that, when the investment in or acquisition of gold, which was recovered from the assessee was not recorded in the books of accounts and the assessee offered no explanation about the nature and source of such investment or acquisition and the value of such gold was not recorded in the books of accounts, nor the nature and source of its acquisition explained, there could arise no question of treating the value of such gold, which was deemed to be the income of the assessee, as a deductible trading loss on its confiscation, because, such deemed income did not fall under the head of income "profits and gains of business or profession".

8. In our opinion, therefore, the Tribunal was perfectly right in holding that the value of the gold was liable to be included in the income of the assessee as

the source of investment in the gold or of its acquisition was not explained and that the assessee was not entitled to claim that the value of the gold should be allowed as a deduction from his income.

Both the questions referred to us are, therefore, answered in the affirmative, against the assessee and in favour of the revenue. The Reference stands disposed of accordingly with no order as to costs.

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(R.K. Abichandani, J.)

(A.R. Dave, J.)

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